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ABSTRACT

The paper examines current judicial interpretations of selected policy and implementation issues concerning P.L. 94-142, the Education for All Handicapped Children Act. Court cases are analyzed according to the following six principles of the legislation (sample subtopics in parentheses): zero reject--the right of handicapped children to be included in a free, appropriate, publicly supported educational system (expulsion and suspension, residential placement costs, minimum competency testing); nondiscriminatory evaluation; individualized and appropriate education (related services, extended school year); least restrictive educational placement; procedural due process (availability of due process hearings, exhaustion of administrative remedies); and parent participation in decisionmaking. The principles are described and relevant judicial interpretations noted. A summary section notes that with the courts' insistence, schools are learning to individualize education for exceptional children. The paper concludes with four hypothetical cases in which readers are asked to consider legal implications and the application of P.L. 94-142 as well as of court cases. (CL)

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SPECIAL EDUCATION IN AMERICA

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SPECIAL
EDUCATION
IN
AMERICA
ITS
LEGAL
AND
GOVERNMENTAL
FOUNDATIONS
SERIES

JUDICIAL INTERPRETATION OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

A product of the ERIC Clearinghouse on Handicapped and Gifted Children

The Council for Exceptional Children

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ABOUT THE SERIES

The past two decades have brought about dramatic changes in the fundamental policies governing special education. Terms that today glibly roll from our tongues, such as the right to education, IEP, due process, nondiscriminatory assessment, zero reject, and least restrictive environment, were not a part of our lexicon only a decade ago. Today it is not sufficient to simply know how to teach in order to be a teacher; to know how to manage in order to be an administrator; or to know how to care in order to be a parent. Today, and in the future before us, all persons involved in special education must be fully knowledgeable of the legal and governmental foundations governing education of handicapped and gifted children. It is to this purpose that this series is devoted.

It is natural that The Council for Exceptional Children undertake this series due to its role as the authority and resource educators look to for guidance in providing an appropriate education for their handicapped and gifted students. CEC has been a dominant force in translating the fundamental precepts of special education into policies that provide basic protections for exceptional children and their families. In fact, the policy research activities of CEC have provided the models upon which many federal, state and provincial, and local policies have been formulated and evaluated. CEC's activities at all levels of government have been a major force in the adoption, implementation, and enforcement of progressive public policy. And finally, through its publications, training materials, conventions, workshops, technical assistance, and other services, CEC has been a major resource whereby policy makers and utilizers understand policy and translate it into action.

This series represents a next step in the evolution of CEC's public policy publications. The flagship text for the series, Special Education in America: Its Legal and Governmental Foundations, edited by Joseph Ballard, Bruce Ramirez, and Frederick Weintraub, provides the basic knowledge that every general and special educator and parent of an exceptional child should have. The text is designed for use in professional training programs as well as a basic information resource for practitioners and parents. It is not a book written for lawyers—the editors have tried to follow the old axiom, "keep it simple," to assure a style that is understandable to the general public. Chapter authors were selected because of their extensive knowledge of the subject and their ability to communicate this knowledge in understandable terms. The supplemental works of the series, published as ERIC Exceptional Child Education Reports, provide more intensive information in specific subject areas, but do not repeat the basic information contained in the primary text. For example, the reader whose primary interest is in early childhood special education policy issues would first want to obtain a knowledge base in special education policy by reading Special Education in America: Its Legal and Governmental Foundations, and then turn to Policy Considerations Related to Early Childhood Special Education, by Dr. Barbara J. Smith, for a thorough treatment of this specific policy area.

Some may ask, "Why publish a special education public policy series when so many proposals for change are being promoted?" Public Policy is dynamic and, thus, is always in a state of change. However, the fundamental policy principles tend to evolve over time on a steady course, while the more detailed requirements tend to shift with the political and economic winds. Therefore, the primary text of the series serves as a basic work that will have reasonable longevity, while the more detailed supplemental publications, such as this one, will have a shorter life span and will be updated accordingly. Further, we believe that in a period in which change is being discussed, it is imperative that persons affected by such changes understand the nature and evolution of present policies so that they can better assess and contribute to the changes being proposed.

Frederick J. Weintraub

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PREFACE

The American system of government is rather simple in its basic structure, and it is that system within which the educational rights of disabled children and the educational duties of public schools are determined. To have an appreciation of those rights and duties, therefore, it will be helpful for the reader to have a brief review of the system of government that the United States Constitution and the constitutions of the states mandate.

This system is known as a "federal" system--the form of government that accommodates two parallel systems, one for the federal government (i.e., the United States) and one for each of the states (i.e. state government). The federal government is concerned with issues that never are addressed by state governments, e.g., supporting an armed force, conducting foreign policy, regulating interstate commerce, printing and supporting a national currency, and carrying out the other duties imposed on it by the federal constitution. The federal government also is concerned with the enforcement of the rights of United States citizens as granted to them in the federal constitution (particularly in the amendments to the federal constitution).

It is in its enforcement of those constitutional rights that the federal government affects citizens in ways that the state governments also affect them. For example, in enforcing citizens' rights under the federal constitution to due process (under the 5th and 14th ammendments to the federal constitution) and to equal protection (under the 14th ammendment), the federal government has enacted laws concerning education, particularly concerning special education (P.L. 94-142, Education for All Handicapped Children Act). These laws carry out Congress' sense of what the federal constitution requires. The federal courts also have interpreted the federal constitution in matters concerning education.

Each state, however, also is concerned with issues of education. Each has a provision in its constitution that requires it to provide a system of public education to its citizens. In carrying out its constitutional duty to provide public education, each state has enacted laws creating school systems, providing for their governance, specifying the content of the curriculum to be taught, and, in particular, providing for education of disabled children.

Thus, both the federal government and each of the state governments operate side-by-side in providing educational rights to disabled children

and imposing educational duties on public schools or other educational agencies that accept public money.

Each of the systems is remarkably similar in its organization. Thus, the federal government has a legislature (Congress) that enacts laws (such as P.L. 94-142), an executive branch (U.S. Department of Education, Office of Special Education and Rehabilitation Services) that carries out laws and issues regulations to implement them, and a court system (the federal court system) that interprets the laws when conflicts arise between people affected by them. By the same token, each state has a legislature that enacts special education laws, an executive branch that carries them out (e.g., a department of education or public instruction), and a court system that interprets them. In the material that follows, the law with which the reader will be most concerned is P.L. 94-142, Education for All Handicapped Children Act, enacted by Congress in 1975, carried out by the U.S. Department of Education, Office of Special Education and Rehabilitaton Services, and interpreted by federal and state courts. The reader will not be concerned here with state laws.

One final word about the American system of government. The court system is the final legal means by which people resolve their disputes concerning the meaning of a law or the federal constitution. Again, the similarities between the federal and the state court systems are remarkable. Each has a trial court system--the courts in which cases are first heard; an appeals court system--the courts to which parties may appeal an unfavorable decision of a trial court; and a supreme court system--the court of last resort, where all issues are finally resolved, on appeal from the appeals courts. In the federal court system, the trial courts are called "district" courts, the appeals courts are called "circuit courts of appeals," and the supreme court is called the United States Supreme Court. It has the final say about the law in the sense that its decisions are binding (set precedents) throughout the nation; the other federal courts' decisions are binding only in their respective "circuits" (which always involve more than one state) or "districts" (which never involve more than one state and sometimes comprise less than a full state). The decisions discussed in the material that follows were, for the most part, decided by federal courts.

INTRODUCTION

The enactment in 1975 of P.L. 94-142, the Education for All Handicapped Children Act, ushered in a new era in relations between public education and handicapped children and their families. This new relationship called forth a radical re-thinking of heretofore accepted policies and practices of public school exclusion of handicapped children. The repercussions of P.L. 94-142 have been dramatic and will, undoubtedly, continue to be felt well into the foreseeable future.

When one considers the significant changes in educational policy and practice brought about by P.L. 94-142, the necessity of judicial involvement to interpret the Act and its regulations is entirely predictable. It is the purpose of this paper to acquaint the reader with the current judicial interpretations of some of the major policy and implementation issues stemming from P.L. 94-142.

To provide order to this review of judicial decisions, we will analyze the court cases according to the six major principles of handicapped children's educational rights as established by P.L. 94-142 and as discussed in detail in Turnbull and Turnbull (1978, 3rd ed., 1982). These six principles of the court cases and federal legislation are: (1) zero reject--the right of each handicapped child to be included in a free appropriate publicly supported educational system; (2) nondiscriminatory evaluation--the child's right to be fairly evaluated so that correct educational programs and placement can be achieved; (3) individually determined appropriate education, so that an education can be meaningful; (4) "least restrictive" educational placement--the right to normalization; (5) procedural due process--the right to challenge; and (6) parent participation in decision-making--the right of participatory democracy.

In an effort to provide the reader with some background in these issues, each review of the six principles and corresponding judicial interpretations will commence with a brief explanation of that particular legal principle.

ZERO REJECT

The principle of zero reject rests squarely on the Fourteenth Amendment's provision that no state may deny to any person within its jurisdiction the equal protection of the laws. As applied to handicapped children, and through a series of judicial interpretations, the Fourteenth Amendment has come to represent a principle that prevents governments from denying their benefits to persons because of certain unalterable characteristics (such as handicap). Even a cursory examination of handicapped children's educational history uncovers blatant inequalities and discrimination. The Fourteenth Amendment, as expressed in the principle of zero reject, has become a vehicle for redressing educational inequality and discrimination.

The practical effect of zero reject is that all age-eligible handicapped children, no matter how severe their handicapping conditions, must be allowed to attend public schools. The zero reject principle takes due notice of the historical importance of public education in our society and justly recognizes that failure to educate a handicapped child often leads to enforced and permanent dependency. Such a lack of educational opportunity, and the resultant dependent status of handicapped people, will ultimately increase the social and economic costs to society through the maintenance of handicapped people (in segregated, and thus more costly, settings and services). The integration of handicapped with nonhandicapped students in public schools enhances the pluralistic underpinnings of our society and clearly conveys the message that inclusion of handicapped children in public shcools is a right, not a mere privilege.

Expulsion and Suspension

For many years, disciplinary procedures have been a means of excluding handicapped children from public schools. According to Turnbull and Turnbull (1978), "The application of school discipline codes to handicapped children poses one of the more difficult issues arising out of P.L. 94-142." Even though P.L. 94-142 does not address the problem of expulsion and suspension explicitly, it does provide due process procedures to assure provision of a free appropriate education. The controversy has arisen over whether school districts may use the same disciplinary procedures and guidelines with handicapped students as with nonhandicapped students.

The general rule concerning expulsion of handicapped students is that P.L. 94-142 does not prohibit all expulsions of disruptive handicapped children. It only prohibits the expulsion of handicapped children who are disruptive because of their handicaps. In the landmark *S-1 v. Turlington* (1981) decision, identified handicapped students were expelled for over a year. Prior to expulsion, no determination was made as to the relationship between the students' misconduct and their handicapping conditions. The school district contended that the students lost their right to a free appropriate public education under P.L. 94-142 when they were expelled because of their misconduct. Further, the school district argued that only if the students had been classified as "seriously emotionally disturbed" would their conduct have been relevant to their expulsion. The Fifth Circuit Court of Appeals affirmed the judgment reached by the Florida District Court that expulsion is "... a termination of educational services, occasioned by an expulsion, and is a change in educational placement, thereby invoking the procedural protections of the Education for All Handicaped Children Act." The court also ruled that before a handicapped student may be expelled, a trained and knowledgeable group of persons must determine that the student's misconduct bears no relationship to the handicapping condition.

The *Turlington* holding was most recently adopted by the Sixth Circuit Court of Appeals in *Kaelin v. Grubbs* (1982). The *Kaelin* court

held that "... an expulsion from school is a 'change of placement.'" As in *Turlington*, the court agreed that while a handicapped child may be expelled (under certain conditions and in accordance with due process procedures), a complete cessation of educational services is not permitted.

The rationale against expulsion of a child whose handicap causes his behavior to be in discord with school rules seems to be that (1) expulsion violates the zero-reject rule (a rule of inclusion and against exclusion) and (2) expulsion is the most restrictive placement of all, because it is functionally a "no placement" situation, and therefore violates the principle of "least restrictive" educational placement.

Residential Placement Costs

The expense of residential placement for a handicapped child can be substantial. Therefore, school districts have sought to avoid the full expense of residential placement and have generally been successful. The key, in determining whether the school district pays for the residential placement, is to decide what is an "appropriate education" for the handicapped child in question. If the only appropriate education for the handicapped child is a residential placement, then, generally, the school district pays the entire cost. The notion of what constitutes a "residential placement" has expanded. For instance, the provision and cost of a special education has recently been extended to handicapped prison inmates who are not yet 22 years old, *Green v. Johnson* (1981).

There are some exceptions to the general rule that the school district pays for residential placement costs. The most notable exception can be found in *Foster v. D.C. Board of Education* (1981), which held that parents may not recover tuition after unilaterally placing their child in private school and not exhausting administrative remedies. In other words, parents must first work with the local school district to determine the appropriate program for ther child, and whether such a program can be provided by the school district before, unilaterally placing their child in a private school, and they must follow the procedural requirements of the law. A spin-off of this unilateral placement exception is stated in *William S. v. Gill* (1982), where the court allowed tuition reimbursement to parents who had unilaterally placed their child in a private school. The *Gill* case is distinguishable from *Foster* in that the evidence indicated the child's physical health would have been endangered in the current placement.

A school district may be charged residential placement costs if it fails to take timely action in objecting to the private school placement. The court in *Leo P. v. Board* (1982) charged the school district with the tuition cost of a private school placement. This school district had agreed to a private school placement for one academic year plus the summer session. The school district allowed the second academic year to commence before it refused to pay for another year's tuition, claiming it

had an appropriate program. The court ruled that the school district's objection was not timely and that it had to pay for the second year of tuition.

Finally, a crucial issue is now being raised by school districts in challenging their duty to pay for some residential placements. The argument being advanced by some school districts is that there are severely handicapped children who are ineducable, they are allegedly incapable of learning anything meaningful and thus should be excluded from educational programs. Once excluded from "educational programs," the school district no longer, it is maintained, has the financial obligation for residential placement costs.

The priciple of zero reject is readily apparent in the ineducability debate. The thrust of the argument is that if a child cannot learn, then the child does not belong in school; therefore, the child is not protected by P.L. 94-142 and, accordingly, the child can be totally excluded from a public education. The most prominent case to date to cosider the ineducability question is *Levine v. N.J.* (1980). The *Levine* Court held that the state is not required by either state or federal constitutions to provide a free appropriate education to institutionalized profoundly retarded children. It should be noted that neither the application to this issue of P.L. 94-142 nor Section 504 of the Vocational Rehabilitation Act was determined in this case.

Levine arose out of a challenge brought by several parents of severely retarded children to attempt to change New Jersey's practice of charging parents for residential care provided for their children. The court found that the residential care that such children require for day-to-day well-being does not qualify as education. The court adopted a very limited interpretation of "education" under the state constitution, namely, "that which prepares children to function politically, economically, and socially in a democratic society." The court further assumed that severely retarded children would never be able to function in such a manner and thus were not proper "educational subjects." (For a case that also raises the issue of educability, see *Matthews v. Campbell*.)

It is patently clear that the future judicial resolution of ineducability debate will depend largely on the definition of educability. The *Levine* court's definition of education stands in stark contrast to the definition advanced by special educators such as *Stainback and Stainback* (1976) (primarily in connection with multiply and severely disabled children): "being able to learn response to environmental stimulation, head and trunk balance, sucking, swallowing and chewing, grasping, movement of body parts, vocalizations, and at higher levels, initiation, language acquisition, self-feeding, ambulation, dressing skills, toilet training, social/recreational behaviors and/or academic and vocational skills."

Obviously, the Stainbacks' definition makes it much more difficult to exclude a handicapped child from public education as a "non-learner." It is significant that dictum from several opinions of courts, *Kruelle v. New Castle Co. School Dist.* (1981) and *PARC v. Commonwealth* (1972), faced with a claim that the disabled child is not educable, tend to be at odds with the *Levine* language.

Contact Sports

Participation in contact sports as an extracurricular activity offered by a school district can enhance a child's educational experience. Under P.L. 94-142, handicapped students are entitled to participate in extracurricular activities to the same extent as nonhandicapped students. The issue of handicapped student participation in contact sports arises over concern for medical risks and/or dangers.

In *Grube v. Bethlehem Area School District* (1982), a high school student was excluded from the football team on which he had played for 3 years on the basis that he had only one kidney. Medical evidence indicated that risk of injury was slim and that there was no justifiable reason for exclusion, especially when the student's participation would require no substantial adjustments to the program and would not lower standards of the team as a whole. Several other cases reached similar conclusions (*Poole v. South Plainfield* (1980) and *Wright v. Columbia University* (1981)). However, where the evidence is disputed about risk of injury, the school has been held not in violation of Sec. 504's nondiscrimination provision by prohibiting contact sports, *Kampmeier v. Nyquist* (1977).

Minimum Competency Testing

A current controversy has concerned minimum competency tests as a requirement for a graduation diploma. As could be expected, the move to minimum competency testing has had far ranging implications for handicapped students. A potential zero reject issue is invoked if a child's failure of a MCT serves as a school excuse to deny a handicapped student a free and appropriate public education or a graduation diploma.

The law and existing judicial imterpretation appear to be fairly clear on the ramifications of minimum competency testing on handicapped students' educational rights. The court in education *Brookhart v. Illinois State Board of Education* (1982) held that the administration of state mandated minimum competency tests to handicapped students who failed the test, did not violate Section 504 (Vocational Rehabilitation Act of 1973) or P.L. 94-142. The court did note that the test administration must accommodate students with physical handicaps. The court determined that there is no denial of due process of law if a handicapped student fails the test and has not been educated in the test's subject matter, provided there has been a professional determination, in developing that student's IEP, that exposure to the MCT subject matter is

inappropriate in view of the student's handicapping conditions. On appeal, the Seventh Circuit Court of Appeals upheld the district court's ruling. Specifically, the court held that denial of diplomas to special education students who fail to pass MCT does not deny them a free and appropriate education. Furthermore, use of MCT does not violate non-discriminatory evaluation requirements where MCT is but one of three requirements for graduation; denial of diploma for failure to pass MCT does not violate Sec. 504 because handicapped students are not qualified in spite of their handicaps; and adequate notice of MCT and graduation requirements must be given. If notice is lacking, a substantive due process violation would occur because students have a liberty interest in the diploma.

A similar decision was reached by the court in *Board of Education v. Ambach* (1982). The *Ambach* court held that failure of handicapped students to pass MCT, and denial of diploma for that reason, does not violate Sec. 504 because students are not "otherwise qualified." P.L. 94-142 does not prevent denial of diploma to a handicapped student who received an appropriate education as outlined in his/her IEP.

NON-DISCRIMINATORY EVALUATION

One constitutional foundation underlying the principle of nondiscriminatory evaluation (and classification) can be found in the Fifth and Fourteenth Amendments' guarantee that a person shall not be deprived of life, liberty, or property without due process of law. The argument has been made that denying an education is tantamount to denying an opportu- nity to develop the ability to acquire property. The other ground is in the 14th Amendment's equal protection clause, which arguably is violated by erroneous school classification, particularly disproportionate placement of racial and ethnic minority students into special education classrooms. The concern is that their classification illegally reestablishes a dual system of education based on race.

P.L. 94-142 takes due account of the importance of testing and evaluation measures to identify, plan, and implement educational programs for handicapped students. The act is equally cognizant of the potential dangers in evaluation procedures of any kind. Accordingly, P.L. 94-142 and its regulations establish procedures and safeguards designed to assure that evaluation mechanisms are racially and culturally fair. The commitment to nondiscriminatiory evaluation is a continuing struggle inasmuch as special education classes have been filled with a disproportionate number of minority students. There is a constant fear that special education and its attendant evaluation and classification mechanisms will result in state-imposed racial discrimination in violation of the equal protection clause of the Fourteenth Amendment.

The concern over nondiscriminatory evaluation and classification generally centers on the issue of whether standardized achievement tests

discriminate against students who are from economically deprived backgrounds or are members of racial or ethnic minorities. The two major cases which decide this issue are *Larry P. v. Riles* (1979) and *Parents in Action* (PASE) v. *Hannon* (1980). The two decisions stand in contrast to each other, both in terms of reasoning and results.

The court in *Larry P.* ruled that California schools no longer may use standardized IQ tests for the purpose of identifying and placing black children into segregated special education classes for educable mentally retarded children. The court found that standardized IQ tests (Stanford-Binet, Wechsler, and Leiter) are racially and culturally biased and have a discriminatiory impact on black children because they cause such children to be placed in segregated special education classrooms.

The *Larry P.* court was faced with the unenviable task of explaining the disproportionate enrollment of blacks in educable mentally retarded classes. The Court rejected two explanations for the disproportionate enrollment: The "genetic" argument (blacks are inherently less intelligent than whites), and the "socioeconomic" argument (economically deprived background explains the lower performance of blacks). Thus, the Court was left with the "cultural bias" argument which maintained that IQ tests measure intelligence as manifested by white, middle-class children and therefore are racially and culturally biased against blacks. Another plausible explanation for the Court's ultimate decision was that the "cultural bias" argument was the only explanation for which the Court could take affirmative actions.

Standing in contrast to *Larry P.* is *PASE*. The *PASE* Court upheld the same tests that *Larry P.* had held unlawful as racially discriminatory. The Court examined the individual IQ tests item by item and found that, although some items in the tests were discriminatory, the tests were generally racially and culturally fair. It is important to keep in mind that the *PASE* Court did not consider the issue whether IQ tests are generally valid as measures of intelligence. Furthermore, the *PASE* decision should also be construed in light of the Court's determination that the IQ tests were not the sole basis for classification.

INDIVIDUALIZED APPROPRIATE EDUCATION

The constitutional underpinnings of the principle that mandates an individualized and appropriate education can be found in the substantive due process clause of the Fifth and Fourteenth Amendments and the equal protection clause of the Fourteenth. The constitutional principles are applicable because of total and functional exclusion of handicapped children from a public school education. We have already discussed the operation of total exclusion in conjunction with the zero reject principle. Functional exclusion refers to the "appropriateness" of a handicapped child's education. Education that lacks meaning or significance (i.e., is not appropriate) for the student is tantamount to no education at all. The child is functionally excluded.

The requirement that every handicapped student be provided with a "free appropriate public education" is the linchpin of P.L. 94-142. Congress, probably to its credit, avoided the conundrum of specifically defining what is meant by "appropriate education." Instead, the statutory definition is very general: "a program of special education and related services which (a) have been provided at public expense, under public supervision and direction, and without charge, (b) meet the standards of the state educational agency, (c) include an appropriate preschool, elementary, or secondary school education in the state involved, and (d) are provided in conformity with the individualized education program..."

The reluctance of Congress to specifically define "appropriate education" has caused a plethora of judicial interpretations of "appropriateness." "Appropriateness," depending on the orientation of the particular school administrator or parent, may be interpreted in a variety of ways. For some school officials, a program meets the legal standard if a child is permitted to attend school and is provided with the services that a local board of education can afford. Some parents, on the other hand, have argued that every service that will aid a child should be provided to the fullest extent possible. Obviously, such diverse notions of the meaning of "appropriate" can only require judicial intervention to resolve the dispute.

Generally, there have been three major approaches to defining "appropriate education." One approach maintains that the requirement that a handicapped child's education be appropriate is simply a requirement that it be individually appropriate. This boils down to a requirement that the child's education be individualized. The policy of providing an appropriate education is achieved principally by the device of the individualized education program (IEP). Basically, the IEP itself is a written statement of (a) a handicapped child's present level of educational performance and function; (b) the specific annual goals, including shorter-term goals, that educators hope to achieve for the child; (c) the special education and related services to be provided the child; and (d) the specific times and classes in which the child will be able to participate in regular programs. In essence, an "appropriate education" is what the IEP says it is, if the IEP is developed properly.

A second approach seeks to define "appropriate education" by a process. The belief is that a fair process (set of procedures) will produce a fair result--an appropriate education. A fair process provides for the following: (a) a nondiscriminatory evaluation; (b) development of an individualized education program; (c) placement of the child in the least restrictive appropriate program; (d) availability of a due process hearing if either the parents or school want to contest a child's evaluation, placement, or program; and (e) parental participation in the child's IEP, and parental access to the child's records.

A third approach relies on language from the regulations under Sec. 504 of the Rehabilitation Act of 1973. This amounts to a "comparability"

or "equivalency" definition. Under this "comparability", standard schools are required to provide handicapped children with special education and related aids and services designed to meet their educational needs as adequately as the needs of nonhandicapped children are met.

Three major developments in judicial interpretations of "appropriate education" have involved the issues of related services; the extended school year; and the difference between adequate and ideal education which evolved from the Rowley case, the U.S. Supreme Court's 1982 attempt at defining "appropriate education." Each issue will be discussed in the ensuing sections.

Related Services

The specific related services to be developed and offered under the law are another source of confusion, although P.L. 94-142 mandates the provision of special education and related services to qualified handicapped children. Related services include, but are not limited to, audiology; speech pathology; psychological services; physical and occupational therapy; recreation; early identification and assessment of disabilities of children; counseling; and the services of a physician when required to diagnose a child's exceptionality, needs for special education, and related services. The critical questions are: What is it that will help a child to benefit from a program of education, and, does the child need a particular service to benefit from a program of special education? The answers to these questions have been decided on case-by-case basis.

The following two cases represent recent judicial interpretations of what is meant by "related services" employing a case-by-case approach. In *Espino v. Besteiro* (1981) the court held that a school district must provide an air conditioned classroom for a multihandicapped child who cannot regulate his body's temperature. The court reasoned that placing him in an air conditioned plexiglass cubicle would unduly restrict him from interacting with his peers. Therefore, in order to provide an "appropriate education" in a least restrictive setting, the school was ordered to install air conditioning.

A second case, *Tokarcik v. Forest Hills* (1981), decreed that catheterization was a legitimate related service for which the school district was responsible. This case involved a third grade student who was born with spina bifida and thus required catheterization every three or four hours. Without continued catheterization, she ran the risk of serious infection. The court reasoned that catheterization qualified as "related services," both as a health service which can be performed by a school nurse or nurse's assistant, and as occupational therapy necessary for future employment. In this and other related services cases, the courts are concerned with the child's integration with other children as well as with the child's appropriate education. Without school-based catheterization, the child would be educated at home, i.e., in a fairly socially restrictive setting.

Extended School Year

The issue of extending school services beyond the normal school year to certain handicapped children presents an obvious financial burden to school districts. Nevertheless, courts, in certain cases, have been willing to define "appropriate education" as requiring summer school services at public expense.

The leading case is *Battle v. Pennsylvania*, also known as *Armstrong v. Kline* (1980). In this case, medical, psychological, and educational experts testified that the plaintiffs (severely-multiply handicapped students), and a few other seriously impaired students, required programs in excess of the normal school year (in this case, 180 days) in order to learn to the fullest extent of their individual capabilities. They testified--and the court agreed--that these children would regress so substantially when their programs were interrupted that they would begin each fall term without any retention of previous skills. The court ruled that each such child must be given more than 180 days of instruction, even if it is especially costly. The court recognized that the ultimate goal of education is the opportunity to achieve that degree of "self sufficiency" and independence from care-takers that will enable a handicapped person to become a contributing member of society. The court held that in certain cases additional services must be provided to meet the unique needs of handicapped children.

Other cases reaching similar results are *Gladys J. v. Pearland Ind. School District* (1981) and *Kruelle v. New Castle County School District* (1981), in which courts held that an appropriate education for severely emotionally disturbed children includes psychotherapy and 24-hour, 12-month residential placement. A third case, *Birmingham and Lampere School Districts v. Superintendent* (1982), required summer school for special education students. The court held that the 180-day rule is a rule of minimum education.

The key to these extended school year cases appears to be whether there is sufficient evidence of "irreparable loss" to the student if summer school is not provided.

The Rowley Case

Board of Education v. Rowley (1982) is a landmark decision in special education law for several reasons, most notably because the Supreme Court rendered its first decision interpreting P.L. 94-142 in this case. The central issue in the *Rowley* case was whether a school district was obligated under P.L. 94-142 to provide a sign language interpreter for a hearing impaired child who was making above average progress in the regular classroom without such assistance. The federal district court reasoned that without an interpreter the child was not receiving a free appropriate public education, which the court defined as "an opportunity to achieve full potential commensurate with the opportunity provided to

other children." The Second Circuit Court of Appeals affirmed the district court's decision, but noted that the decision was restricted to the facts of the case (plaintiff's parents are also deaf, and evidence at the trial showed that, without an interpreter, only 59 percent of what transpired in the classroom was accessible to the child).

Reversing the lower courts, the six-member majority of the Supreme Court ruled that since the student was receiving a significant amount of specialized instruction and related services at public expense, she was receiving an appropriate education under P.L. 94-142 and was not entitled to a sign language interpreter. The Court rejected the plaintiffs' contention that the goal of P.L. 94-142 is to provide each handicapped child with "an equal educational opportunity." The Court found the "equal opportunity" requirement to be "an entirely unworkable standard requiring impossible measurements and comparisons."

The Court, deferring to professional judgments, adopted the "process definition" of appropriate education and rejected the child's "maximum development" as a goal of the law. In other words, handicapped children are not entitled to a specific level of education. The Court reasoned that the judicial role is not to give substance to the term "appropriate education," but is limited to determining whether the state has complied with the procedures outlined in P.L. 94-142 and whether the individualized program is "reasonably calculated to enable the child to receive educational benefits."

The precedential value of Rowley is somewhat restricted by the specific facts of the case. Because Amy Rowley was mainstreamed and had progressed academically from grade to grade, it is doubtful if the Court's emphasis on grade-to-grade promotion will apply to handicapped children who do not or cannot progress from grade to grade or whose progress cannot be measured by that standard. Also, it is doubtful if the decision will apply to handicapped children who require related services in order to be educated in the mainstream, such as the spina bifida child in Tokarcik.

The impact of *Rowley* has been felt, however. In *Springdale v. Grace* (1982), the Eighth Circuit Court of Appeals applied *Rowley* and held that the mainstreaming goal is served by education in local school districts where instruction is reasonably calculated to provide the child with educational benefits. The "best education" available does not have to be offered.

LEAST RESTRICTIVE EDUCATIONAL PLACEMENT

The "least restrictive environment" principle (LRE) cannot be adequately considered except in conjunction with the principle of "appropriate education." The two principles are inextricably entwined.

Substantive due process under the Fifth and Fourteenth amendments provides the major constitutional foundation for the principle of least restrictive environment. Again, the practice of functional exclusion, or denying equal educational opportunity to handicapped children by placing them in special education programs that are inappropriate for them, is applicable when considering the least restrictive environment requirement.

Undoubtedly, the aspect of P.L. 94-142 that has provoked the most debate and confusion is the provision requiring integration of handicapped students with their nonhandicapped peers. Every educational agency must make certain "(1) that to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and (2) that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." The general rule--handicapped children should be educated with nonhandicapped children--posits a familiar constitutional principle that whenever government intrudes into a person's life it shall be in the least restrictive manner possible.

LRE as a Presumption

LRE is a rebuttable presumption in that it favors integration but allows separation. In other words, LRE requires that a handicapped child receive an education with nonhandicapped children to the maximum extent appropriate for that child, but does allow for exceptions when, because of the nature or severity of a child's handicap, education in regular educational settings cannot be achieved satisfactorily.

Rebuttable presumptions set forth a rule of conduct that must be followed in every case unless, in a particular case, the general rule will have unacceptable consequences for the affected individual. Thus, LRE is not an iron-clad rule; it provides for alternatives to be decided on a case-by-case basis. The application of LRE as a rebuttable presumption and not an iron-clad rule accommodates both normalization concerns and the handicapped child's right to an "appropriate education." For example, residential school placements are presumed to be more restrictive than special school placements. Only when there is a showing that residential school placement is necessary for appropriate education purposes in order to satisfy the individual's interests or valid state purposes is the presumption overcome.

Rebutting the LRE Presumption

In theory, one would assume that LRE is usually followed; in practice, when a dispute arises between parents and educators over the meaning of an "appropriate education," the LRE presumption has been overcome more often than not (Turnbull, et al., 1982). This disparity between theory

and practice rests on the distinction between "rights" and "needs." Courts have attempted to reconcile the "rights" of a handicapped child to education in the LRE with the "needs" (also expressed as a right is an appropriate education) of the handicapped child to receive an appropriate education. In many cases, the courts have been unable (or unwilling) to reconcile "rights" and "needs", and have generally held, in such situations, that appropriate education rights and needs prevail over integration rights. In other words, the courts have tended to show a willingness to rebut the LRE presumption when the educational needs of the handicapped child cannot be adequately met otherwise. This result recognizes the paradox that less restriction (LRE educational program) can result in more restriction (when the child is not receiving an appropriate education to meet his/her needs).

In nearly all of the "appropriate education--LRE" cases, parents and educators of handicapped children have disagreed with each other over the meaning of "appropriate education." In some cases, parents of handicapped children and educators have sought to place handicapped children in "nonregular" or separated, segregated special education settings. In a majority of the cases, the courts ordered "more restrictive" (i.e. segregated) placement. In each of the cases, the children were handicapped by reason of being severely or profoundly emotionally disturbed [*Christopher T. v. San Francisco Unified School District*, 553 F. Supp. 1107, 4 EHLR 554:351, (N.D. Cal. Mar. 2, 1982); *Erdman v. Connecticut*, ___ F. Supp.___ , 3 EHLR 522:218 (D. Conn. 1980); *North v. D.C. Board of Education*, 471 F. Supp. 634 (D.D.C. 1979); *In re "A" Family*, 602 P. 2d 157 (Mont. 1979); *Gladys J. v. Pearland Independent School District*, 520 F. Supp. 869, 3 EHLR 552:480 (S.D. Texas 1981)], mentally retarded [*Kruelle v. Campbell*, 642 F. 2nd 687, 3 EHLR 551:264 (E.D. Va. 1979); *Manchester Board v. Connecticut Board*, 41 Conn. L. J. 35 (Super. Ct. Conn., Feb. 2, 1980); *Harris v. D.C. Board of Education*, ___ F. Supp. ___, 3 EHLR 552:498 (D.D.C. 1981)], or learning disabled [*Cox v. Brown*, 498 F. Supp. 823 (D.D.C. 1980); *Norris v. Massachusetts State Department of Education*, No. 80-1527 (SM) (D. Mass., Oct. 9, 1981)].

Conversely, parents and educators also have sought "least restrictive" or more "normal" placement for handicapped children. Educators were successful in five cases (two children with severe-multiple handicaps, one who is "trainable mentally retarded", one who is severely to moderately retarded, and one who is learning disabled), *DeWalt v. Burkholder*, ___ F. Supp. ___, 3 EHLR 552:550 (E.D. Va. 1980); *Victoria L. v. District School Board of Lee County*, ___ F. Supp. ___, 3 EHLR 552:265 (M.D. Fla. 1980); *Roncker v. Walters*, ___ F. Supp. ___ , 3 EHLR 553:121 (S.D. Ohio 1981), *vacated* on other grounds, 700 F. 2d 1058, 4 EHLR 554:381 (6th Cir. 1983), *cert. den.*, U.S. (1983): *Campbell v. Talladaga*, ___ F. Supp. ___, 3 EHLR 552:472 (N.D. Ala. 1981); and *Town of Burlington v. Dept. of Education*, ___ F. Supp. ___, 3 EHLR 552:408 (D. Mass. 1981), *rev'd in part, aff'd in part*, 655 F. 2d 428 (1st Cir. 1981), Educators were unsuccessful in two other cases profound deafness and severe-profound mental retardation,

New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979); and *Springdale School District v. Grace*, 494 F. Supp. 266 (W.D. ARk. 1980), *aff'd.* 656 F.2d 300 (8th Cir. 1981), *vacated*, 73 L.Ed. 2d 1380, 102 S.Ct. 3504 (1982), *on remand*, 693 F.2d 41 (8th Cir. 1982).

Where parents and educators have not been able to agree on the proper placement for a particular child, courts have been required to define an "appropriate" education and the application of LRE to the child, in the context of appropriate education. In cases in which parents have sought institutional or other "more restrictive" placement, but schools have opposed such placement, courts decided in favor of the parents in a clear majority of the cases. Similarly, where schools have sought institutional placement contrary to parents' desires, courts ordered such placement in a majority of the cases.

As we have seen, one of the justifications for rebutting the LRE presumption emanates from the "appropriate education" principle. Courts are concerned primarily about "appropriate education," not about lockstep adherence to a hard and fast rule of integration.

The other major explanation in judicial rebutting of the LRE presumptions is the "harmful effects" exception. The language of the Act's regulations excuses the LRE from being applied to a child who cannot be educated satisfactorily in regular programs or schools even with the use of supplementary aids and services.

Because the "appropriate education" and "LRE" doctrines have been the cause of so much difficulty, a reader interested in them should consult the hypothetical case set out following the text of this essay. There, we try to indicate the legal issues involved in a hypothetical case, and the factors a court should take into account in resolving the issues. In addition, the reader should refer to the following articles for a detailed analysis of the LRE role and for lengthy discission that supports the brief discussion in this essay: Turnbull, H. R., ed. *The Least Restrictive Alternative· Principles and Practices*, American Association on Mental Deficiency, Washington DC, 1981; Turnbull, H. R., Brotherson, M. J., Wheat, M., and Esquith, D. *The Least Restrictive Educational Alternative for Handicapped Children· Who Really Wants It?*, 6 Family Law Quarterly 161 (Fall 1982); and Turnbull, H. R., et al. *A Policy Analysis of "Least Restrictive" Education of Handicapped Children*, 14 Rutgers Law Journal (Spring, 1983).

PROCEDURAL DUE PROCESS

The principle of procedural due process reflects the judicial affinity for procedures and the belief that fair procedures will produce fair results. The underlying premise behind procedural due process is that citizens should have the right to protest before a government takes

action with respect to them. Without a means and method of challenging particular school practices in regards to handicapped children, the substantive rights accorded by P.L. 94-142 would be nothing more than a cruel illusion.

The concept of due process has roots in our constitutional form of government. The Fifth and Fourteenth Amendments provide that no state may deprive a person of life, liberty, or property without due process of law. In educational terms, this means that no handicapped child can be deprived of an education (the means for acquiring property, "life," and "liberty," in the sense of self-development) without a right to protest what happens to him/her. Statutorily, the due process safeguards of P.L. 94-142 allow schools or parents the right to challenge each other concerning any aspect of a child's special education program, including the very question of whether the child is handicapped; whether evaluations should be performed; how the child should be classified, if at all; the particular programs or services to be received; and the specific location of the program of special education and related services.

In considering recent judicial interpretations affecting due process requirements, three problem areas are apparent: (a) the availability of due process hearings; (b) the exhaustion of administrative remedies requirement; and (c) the "stay put" rule.

Availability of Due Process Hearings

Courts have been asked to decide who has a right to use the procedural safeguards of P.L. 94-142, in what kinds of cases, and when. In other words, courts have been asked to determine the availability of due process hearings.

The Second Circuit, in *Concerned Parents & Citizens for the Continuing Education at Malcolm X (P.S. 79) v. New York City Board of Education* (1980), concluded that prior notice and a hearing are not required when a handicapped child is transferred from a special class at one school to a substantially similar class at another school within the same school district. Thus, parents have no avenue of protesting this school action because there has been no official change of placement under P.L. 94-142. Similarly, another court recently held that wholesale transfer of students from a private school to alternative placements, because the school district terminated its contract with the private school after an audit, is not a change of placement that triggers a due process hearing, *Dima v. Macchiavola* (1981).

Courts have shown a sensitivity to parental attempts to obtain the substantive rights of P.L. 94-142. For example, the court in *Pastel v. D.C. Board of Education* (1981) held that parents of a handicapped child may request a due process hearing on the issue of appropriateness of their child's continuing placement in his current program. The fact that the parents did not strictly comply with procedural requirements does not

bar them from invoking due process safeguards where the school district failed to inform them of their rights. The court concluded that the school district may not take advantage of its failure to comply with the requirements of parental notice.

Exhaustion of Administrative Remedies

An issue frequently raised is whether handicapped children or their representatives (parents) must "exhaust" their "administrative remedies" (make use of all the P.L. 94-142 procedural safeguard rights) before they may file a lawsuit in a federal or state court. Generally, courts agree that parents must exhaust all administrative remedies prior to commencing a civil action in federal or state court, *Lombardi v. Ambach* (1981). However, as is frequently the case with any general legal rule, there are exceptions.

The most notable exeption to the exhaustion requirement is the "futility exception." If it would be totally "futile" for parents to continue pursuing available administrative remedies, judicial economy and efficiency dictates that such "futile avenues" of resolution be bypassed and court action is permissible, *ARC in Colorado v. Frazier* (1981) and *Miener v. State of Missouri* (1982). An interesting case in point is *Garrity v. Gallen* (1981), where the court held that retarded residents of a state institution, for whom the state failed to appoint surrogate parents, are not required to exhaust their administrative remedies before suing under P.L. 94-142. The court held that the state should not be allowed to benefit from its failure to appoint surrogates for the retarded residents.

Finally, there is judicial concern (exhibited by the exhaustion requirement) that parties to a special education dispute make every attempt to resolve their differences without resorting prematurely to the courts. This judicial concern was evidenced in *Davis v. Maine Endwell Central School District* (1980), where the court held that parents must attempt to resolve their differences with schools with the P.L. 94-142 due process structures before a federal court will allow filing of a law suit.

The "Stay Put" Rule

The "stay put" rule usually surfaces in the context of litigation over the costs of educational placement. The general statutory language provides that the child shall remain in the present placement during the pendency of any due process procedural actions. In *Stemple v. Board of Ed. of Prince George's County* (1980), the court applied a literal interpretation to this statuatory language and concluded that the parents have a "duty" to keep the child in a placement even if it is inappropriate. Furthermore, the parents' removal of their child from his current placement, without school consent, is a unilateral action barring parents from recovering private tuition costs. A similar result was obtained in

Foster v. D.C. Board of Education (1981), where the court held that parents who unilaterally removed their child from one school to another, without first resorting to due process safeguards, alleviated the school district from any tuition liability under P.L. 94-142. Simply stated, the "stay put" rule is that a unilateral placement in a private, tuition-charged program by a child's parent absolves the school district of any financial responsibility.

There may be a possible exception to the "stay put" rule as enunciated by the court in *Stacey G. v. Pasadena I.S.D.* (1983). The exception seems to occur where the current placement may cause irreparable harm to the child. In such situations, parent's unilateral action to privately place their child may not relieve the school district of financial responsibility.

PARENT PARTICIPATION

The principle providing for parental participation and shared decision making with educators will be briefly discussed. The limited amount of space devoted to a discussion concerning parent participation should not imply a diminished importance or lesser significance of this principle vis-a-vis the other five major principles of P.L. 94-142. In fact, the principle of parent participation represents a most radical concept in educational operations and is a primary mechanism for ensuring the other substantive rights of P.L. 94-142.

The constitutional foundations for parent participation in the education of handicapped children are not as readily identifiable as the other principles. The notion of parent participation in educational decision making stems from common law and numerous statutory provisions that speak to the duties that parents have toward their children. For example, statutes make parents criminally liable for failing to support their minor children. Parents are also generally empowered to consent to medical treatment for their minor children. Considering these statutory obligations, the involvement of parents in educational decisions is a logical extension of parental responsibility.

Parent participation in P.L. 94-142 implicates all of the other five major principles. Parents are involved in the principle of zero reject by their act of identifying the child to school officials and by seeking enrollment of the child into the public schools. Parents must give consent prior to any formal evaluation of their child. Parents help assure an "appropriate education" for their child by participation as a member of the educational planning team. As an educational planning member, parents can assure that their child will be educated in the least restrictive environment which is appropriate. Finally, parents may invoke the due process procedures by requesting a hearing to protest school actions.

SUMMARY

This essay has attempted to acquaint the reader with the most important issues that the courts have had to face from 1980 to 1983 in interpreting P.L. 94-142, the Education for All Handicapped Children Act. It is by no means exhaustive of the issues; nor does it purport to be a thorough analysis of those issues. Readers wishing to obtain thorough and carefully analyzed discussions of the law and judicial interpretation should consult the selected bibliography that follows this essay.

It should be clear to the reader that the Act itself is by no means self-explanatory, and judicial interpretation has been and will continue to be required to make it work. The remarkable thing about judicial interpretation is that, as the courts give substance to the law, they basically have commanded and enabled public schools to carry out the duties that the Congress has imposed on them. That is, as the courts have ruled on such matters as expulsion, IQ testing, appropriate placement and use of residental facilities, and the accountability of schools and parents to each other through due process, they have given a clear indication that appropriate education of all children not only must be undertaken, but also can be accomplished, by public schools. This in itself is remarkable, for, with the courts' presence, schools are learning how to individualize education for the exceptional child; in this, they are learning new ways of dealing with children, ways that one hopes will be generalized to all children, not just those with disabilities.

HYPOTHETICAL CASES

In an effort to make the preceding discussion seem more alive, in the sense that it applies to "real" people, four hypothetical cases are provided. Each case sets out the rudimentary facts, the positions of each party, and the issues of law that must be resolved. The reader should approach the problem-solving in the following manner: (a) identify the applicable provisions of P.L. 94-142 and its regulations; (b) identify the applicable cases, referred to within the text of this essay; (c) apply the statute, regulations, and cases to the hypothetical case; and (d) reach a result that specifies the legal answer and perhaps the way a responsible school or school district should respond to the legal result.

After completing this exercise, the reader may want to consult the authors' response to the case.

The reader is cautioned that the authors' response is not guaranteed to be the response a court would reach in the case. It is, at best, a defensible position.

Hypothetical Cases of Debbie and David Darling

Debbie Darling is 18 years old and has attended Northern Public Schools for 12 years, the majority of her schooling being in special education classes. Debbie has been diagnosed as having a specific learning disability, which has affected her ability in math (3rd-grade level) and her proficiency in reading (8th-grade level). As determined by her successful completion of all the goals and objectives on her IEP, Debbie is considered to be ready to graduate.

David Darling is 19 years old and, like his sister, has been enrolled in special education classes at Northern Public Schools his entire school life. David is mentally retarded and on average functions educationally at about a 3rd-grade level. He also has successfully achieved the goals and objectives set forth in his IEP and is ready to graduate.

Two years ago, The Northern School District established a requirement that a student must pass a competency test as a pre-condition to the award of a graduation diploma. There are other requirements for graduation, so that students may graduate (without a diploma) if they fail the competency test. The competency test requirement became effective this year. The new requirement was not specified in Debbie or David's IEPs and their parents were not directly notified as to the diploma requirement.

Debbie passed all but the math portion of the competency test. David was not offered the opportunity to take the test, since the district assumed he could not pass. Both Debbie and David have been informed by the district that they will not receive a diploma upon graduation.

The district maintains that Debbie and David have received a free appropriate public education because they met the goals and objectives on the IEPs as agreed to with their parents. Both students are entitled to graduate this year. The school district argues that to grant a diploma to handicapped students who fail the competency test would render the test meaningless and discriminate against nonhandicapped students who also did not pass the test.

The students and their parents contend that they had a reasonable expectation that they would receive a diploma upon graduation, and the requirement that they pass a competency test was never written in their IEPs. Further, they contend that the test discriminates against them. Debbie notes that her disability prevents her passing the math portion, but with a pocket calculator she can function competently. David contends that he has never been taught most of what the examination measures.

The issues seem to be:

(1) Did Debbie and David receive a free appropriate public education from the Northern Public School District?

(2) Were Debbie and David denied due process of law (i.e., were they treated arbitrarily or unfairly by the school district) if their individual IEPs did not provide for exposure to the type of material contained in the competency test?

(3) Is the use of a competency test as a requirement for a diploma in violation of the non-discriminatory evaluation requirements of P.L. 94-142?

(4) Did Debbie and David receive adequate notice of the competency test requirement to the award of a diploma?

For a *discussion* of the issues, see text at pages 7 and 8.

Resolution of the issues seems to be as follows:

(1) Was a free appropriate public education provided? Answer: yes.
Reasons:
(a) both students were enrolled in public schools;
(b) both students had current IEPs;
(c) According to *Rowley*, a process had been followed in providing an appropriate education to both students (e.g., individual evaluation, development of an IEP, and placement);
(d) *Rowley* holds that under P.L. 94-142 special education students do not have to be provided with educational opportunities which maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped students.

(2) Was there a denial of due process of law (arbitrary action by the school district)? Answer: Probably not.
Reasons:
(a) a violation of due process requires "arbitrary action;"
(b) it was not arbitrary for the school district to devise an IEP that was suitable for each student even though the IEP does not address the competency test items;
(c) if the school district had not provided an IEP that was appropriate to each student's needs, it would have been in violation of P.L. 94-142;
(d) basically, the school district, once it determined what the individual student's needs were, had only one choice, which was to provide an appropriate education through the IEP.

(3) Is there a violation of the non-discriminatory evaluation requirements of 94-142? Answer: Probably not.
Reasons:
(a) non-discriminatory evaluation is not an issue in this case because the competency test is not an evaluation for special education classification or placement;
(b) the competency test is not the only requirement for graduation, and, in fact, both students will be allowed to graduate (without a diploma) because they have satisfied other requirements.

(4) Was adequate notice of the competency test requirement given?
Answer: Probably not.
Reason:
(a) adequate notice consists of actual notice to the students or their parents (e.g., written on the student's IEP or contained in a separate letter);
(b) there is no evidence that either the students or their parents had received actual notice of the competency test requirement at least one year prior to graduation, as required by the court in *Brookhart*.

Hypothetical Case of "Junior" Wilson

"Junior" Wilson is a 9-year old child who has displayed rather aggressive behavior during his first four years of school (he is now in the 4th grade) and who has had great difficulty passing his academic subjects. His difficulty is manifested by poor homework performance, low attentiveness in class, and marginal to below-satisfactory results on teacher-graded tests. School efforts to work with his mother have been problematic. His father abandoned the family, which consists of a younger sister, and an older brother who is classified as educably mentally retarded and is in the special education equivalent of the 9th grade. His mother reports that Junior gets along well at home and in his community; there is no evidence of aggressiveness (or none that is remarkable) in his association with his neighborhood friends ("They all play rough around here," his mother says) and his behavior in the family's church, as reported by the pastor, is "just like a little gentlemen." But his mother will not work with him on his schoolwork, confessing it is difficult for her and that she tried to work with Junior's older brother but "it didn't help him any and it just bothered me something awful."

The school principal, sees Junior as an "EMR" student, like his brother; accordingly, the principal obtained the mother's consent to test Junior for special education placement using the WISC-R and the Stanford - Binet tests. The tests showed Junior to be in the range of "educable mental retardation" (IQ between 50 to 55 and 70 to 75, according to the 1983 Standards of the American Association on Mental Deficiency). Based on these test results, and Junior's school performance, the school system is requesting an IEP meeting to discuss placing Junior in an EMR elementary-level program.

Junior's mother recognizes that her child is having problems in school, but does not believe he is retarded, and she does not want him placed in special education. She has therefore refused to attend the IEP meeting.

The issues seem to be:

(1) Was the evaluation of Junior adequate to reach a reasonable conclusion of mental retardation?
(2) Would the issues be different if Junior was black or bilingual? (see text pages 8-9)
(3) Does Junior's mother's refusal to attend the IEP meeting give the school district the authority to place Junior in the EMR program?
(4) If the school district wishes to pursue further action are there avenues available to them?
(5) If Junior's mother wants to pursue further testing must she do so at her own expense?

Resolution of the issues seem to be as follows:

(1) Was the evaluation of Junior adequate to reach a reasonable conclusion of mental retardation? Answer: No.
   (a) The definition of mental retardation requires that the child have a deficit in "adaptive behavior" as well as intellectual functioning. The school district did not assess adaptive behavior.
   (b) P.L. 94-142 requires a multi-factored evaluation. Two similar I.Q. tests do not meet this criteria.
(2) Would the issues be different if Junior was black or bilingual? Answer: Possibly, but not necessarily.
   (a) The question whether the tests administered are discriminatory is not clear (*Larry P. v. Riles and PASE v. Hannon*).
   (b) One would have to demonstrate a discriminatory pattern throughout the school district to show discriminatory intent.
(3) Does Junior's mother's refusal to attend the IEP meeting give the school district the authority to place Junior in the EMR program? Answer: No. Placement can not take place without parental consent.
(4) If the school district wishes to pursue further action are there remedies available to them? Answer: Yes. The school district can request a due process hearing under P.L. 94-142 to resolve the placement.
(5) If Junior's mother wants to pursue further testing must she do so at her own expense? Answer: No.
   (a) She should attend an IEP meeting.
   (b) Refuse the placement at the meeting.
   (c) Request a due process hearing arguing that she disagrees with the diagnosis on the basis of issue 1.
   (d) She should request that the hearing officer order that a comprehensive multi-factored independent evaluation be provided at public expense.

Hypothetical Case of Paul Person, Jr.

Paul Person, Jr. is an eight-year old child who has tension athetoid cerebral palsy resulting in quadriplegia and confinement to a wheelchair. In addition, he has no intelligible speech but communicates by use of an electronic "language board" (known as an auto-com) by which he indicates letters, words, numbers, or sentences; his ideas are then recorded on a screen and ticker-tape. He is unable to perform the self-help skills of feeding, toileting, and self-mobility. His intelligence is in the average range and he functions academically at a second-grade level. He attends the F.D.R. School, a self-contained facility for physically disabled and other handicapped students; the school is 45 miles from his home. His parents, Eileen and Paul, Sr., wish him to attend the Whippy School District, which has a K-12 student population of 18,000 and is characterized as an suburban-rural school district; it is the school he would attend if he were not placed in the special school.

Whippy School District resists his placement there and takes the following position: Paul is an eight-year old male who has been medically diagnosed as having severe tension athetoid quadriplegia due to cerebral palsy. He is non-ambulatory with no intelligible speech. He is also unable to perform the self-help skills of feeding, toileting, or self-mobilitity. Because of his many individual and specific needs, his education could best be met in a class for physically handicapped students. This setting will provide trained personnel who can best provide for his individual needs on a constant and intensive basis. The individual needs and concerns primarily focus on the following issues: occupational therapy, transportation, personal aides, proper placement, and reading specialists.

Paul's parents, however, contend as follows: Paul is a child who has normal intelligence. He has all the academic and social needs of his peers, and those needs can best be met in a regular classroom where he will be exposed to the socialization process. If Paul cannot "make it" in regular education, then special placement should be considered, but as a second alternative, not the first. He needs to be given a chance like everybody else. He needs early and frequent contact with normal children, and he can function in a regular class with supplementary aids. The placement in a regular class should take place because educational justification and legal principles support that placement. To deny placement in a regular class with supplementary aids is not justifiable under P.L. 94-142.

The issues seem to be:

(1) What is the appropriate educational placement for Paul, considering his rights to an appropriate education and to an education in the "least restrictive environment"?

(2) What related services, if any, will be necessary for him to obtain an appropriate education. Do those services differ according to the school (FDR or Whippy) in which he is placed?

For a discussion of the issues, see text at pages 9 through 16.

Resolution of the issues seem to be as follows:

(1) What is the appropriate educational placement for Paul? The Whippy School District, *not* the F.D.R. School.

(a) Paul is progressing at grade level and has average intelligence. From an academic-achievement point of view, there is no reason for separate schooling. *Rowley* supports the grade-progress standard for determining an appropriate education.

(b) Paul's only special needs relate to mobility, speech, and toileting. With related services and perhaps a teacher aide, Paul can be successfully mainstreamed. P.L. 94-142 presumes a regular school placement is the appropriate one. To overcome the presumption, it must be shown Paul cannot be educated successfully with nondisabled students, even with the use of supplementary aids and services. To date, that burden has not been satisfied. The decision in *Tokarcik* supports the requirement of mainstream education with related services in the case of a student who also has physical disabilities similar to Paul's.

(c) Whippy School must be generally free of architectual barriers and its programs generally accessible to mobility impaired students, like Paul. Sec. 504 of the Rehabilitation Act Amendments, 1973, requires this. Thus, there is no special mobility barrier that legally may bar Paul from Whippy.

(d) Paul has an interest in associating with nondisabled people. Association with them will be academically and socially beneficial to him and may positively change many of their attitudes toward him.

(e) Sec. 504 provides a person shall be educated in a setting near his home if he cannot be educated appropriately in his local school district. F.D.R. school is 45 miles away and placement there may violate the "nearby-home" rule.

(2) What related services are necessary for Paul to obtain an appropriate education, and do they differ from school to school?

Answer: Paul requires speech therapy, in-school special mobility help, and self-care help. But these services are not difficult to obtain at Whippy.

Reasons:

(a) Speech therapy, physical therapy, and self-help care (e.g., by an aide or older students in a K-12 school) are clearly indicated. In a district with 18,000 students and in a K-12 program, these types of services probably already exist and Paul can be added to the caseload. In addition, his teachers can work with the related services personnel in a consultative way. Thus, he would get both direct and indirect services.

(b) Like any nondisabled child, transportation can be provided without substantial modification; he could be lifted into and out of a regular school bus, being only a young boy.

Hypothetical Case of Jock MacDuffie

James E. B. MacDuffie ("Jock") is the son of a well-to-do physician. Jock is 15 years old and entering the 9th grade, but not without controversy. For several years now, he has been involved in the learning disabilities program in his local school district, Southern Hills. During that time, his father ("Ike") and mother ("Sally"), who is socially prominent and a former world-class skier, have on many occassions expressed displeasure with the district's efforts on Jock's behalf. At the end of their son's 8th grade year, they told the school district officials in the LD program and Jock's principal that they were ready to "call it quits on this half-baked excuse for a school" and enroll Jock in a "decent" private school, where he can learn something and feel good about himself. Ike and Sally added, "Our boy's psychologist has tested him, and recommended the private school--she has referred many children there who have Jock's abilities and they are getting along great."

At the beginning of the school year, when Jock was to have entered the 9th grade in his district school, he did not enroll. Instead, about a month after school had begun, the district superintendent received a letter from the MacDuffie's lawyers, advising them that Jock's parents had enrolled him in Quick Slopes Academy, a private residential school in the Vermont mountains. The lawyers demanded the district pay the tuition, room, and board for Jock, and they enclosed a copy of the Academy's bill for $7500 for the tuition, room, and board for the first semester (Aug. through December).

The district's attorney replied to the MacDuffie's lawyers as follows: "Because the MacDuffies did not comply with the procedural requirements of applicable federal and state law, and because the school district has provided, was ready to provide, and would have provided the MacDuffie boy with a free, appropriate education in the least restrictive setting, consistent with his academic needs and extra-curricular abilities, your demand is rejected.

The issue is whether the district is liable to the MacDuffies for the bill of the private school? Answer: No.

For a discussion of the issue, see text at pages 18 through 19.

Resolution of the issue seems to be as follows:

(a) It appears that the MacDuffies made a "unilateral placement" of their son, i.e., they enrolled him without first using, much less exhausting, the due process procedures created by P.L. 94-142.

(b) In addition, if they had begun those procedures, they would have been required to keep Jock in his present placement because they could not show that there would be irreparable damage to him by complying with that rule.

(c) Finally, it appears the school district had an appropriate placement for him, one that also was in the least restrictive setting. At the very least, it appears that the proposed placement on its face would have been appropriate. On the merits of the appropriateness of the placement, then, the district seems to have the best case. It is not necessary, however, to reach the merits because, on procedural grounds, the MacDuffies have forfeited their rights to address the merits.

TABLE OF CASES

A.P.C. in Colorado v. Frazier, Civ. Act, No. 80-K-563 (D. Colo. 1981).

Battle v. Pennsylvania, 629 F. 2d 269 (3d Cir. 1980), cert. den. sub. nom. *Scanlon v. Battle*, 452 U.S. 968 (1981).

Birmingham and Lampere School Districts v. Superintendent, 4 E.H.L.R. (Education of the Handicapped Law Reporter) 554:318 (6th Cir. 1982).

Board of Education v. Ambach, 436 N.Y.S. 2d 564 (1981)

Board v. Rowley, ____ U.S. ____, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982).

Brookhart v. Illinois State Board of Education, 534 F. Supp. 725 (C.D. Ill., 1982), *aff'd.* 697 F. 2d 179 (7th Cir. 1983).

Concerned Parents & Citizens For the Continuing Education at Malcolm X (P.S. 79) v. New York City Board of Education, 629 F. 2d 751 (2d Cir. 1980), *cert. den.* 452 U.S. 938 (1981).

Davis v. Mine Endwell Central School District, ____ F. 2d ____ (2nd Cir. 1980), cert. den. 449 U.S. 938 (1981).

Tima v. Macchiavola, No. CV-80-2848 (E.D.N.Y. 1981).

Espino v. Besterio, 520 F. Supp. 905 (S.D. Texas 1981).

Foster v. D.C. Board of Education, 523 F. Supp. 1142 (D.D.C. 1981).

Garrity v. Galen, No. 78-116-D (D.N.H. 1981).

Gladys J. v. Pearland, 520 F. Supp. 869 (S.D. Texas 1981).

Green v. Johnson, 515 F. Supp. 965 (D. Mass. 1981).

Grube v. Bethlehem Area School District, 4 E.H.L.R. 554:280 (E.D. Pa., 1981).

Kaelin v. Grubbs, 4 E.H.L.R. 554:115 (6th Cir. 1982).

Kampmeir v. Nyquist, 553 F. 2d 296 (2d Cir. 1977).

Kruelle v. New Castle Co. School District, 642 F. 2d 687 (3d Cir. 1981).

Larry P. v. Riles, 495 F. Supp. 926 (N.D. Col. 1979).

Leo P. v. Board, No. 80-C-6179 (N.D. Ill. Apr. 13, 1982).

levine v. New Jersey, No. A-55 (N.J. Sup. Ct., July 30, 1980).

lombardi v. Ambach, 522 F. Supp. 867 (E.D.N.Y. 1981).

Meiner v. State of Missouri, 673 F. 2d 969, cert. den. U.S. , 74 L. Ed. 171, 103 S. Ct. 215, 230 (1982).

PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972).

PASE v. Hannon, 506 F. Supp. 831 (N.D. Ill. 1980).

Pastel v. T.C. Board of Education, 522 F. Supp. 535 (D.D.C. 1981).

Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D.N.J. 1981).

S-l v. Turlington, 635 F. 2d 342 (5th Cir. 1981)), cert. den., 454 U.S. 1030 (1981).

Springdale v. Grace, 494 F. Supp. 266 (W.D. Ark. 1980), *aff'd.* 656 F. 2d 300 (8th Cir. 1981)J, *vacated*, 73 L. Ed. 2d 1380, 102 S. Ct. 3054, *on remand*, 693 F. 2d 41 (8th Cir. 1982).

Stacey G. v. Pasadena I.S.D., 4 E.H.L.R. 554:269 (5th Cir. 1983).

Stemple v. Board of Education of Prince George's Co., 464 F. Supp. 258 (D. Md. 1979), 623 F. 2d 893 (4th Cir. 1980)), *cert. den.* 450 U.S. 911 (1981).

Tokarcik v. Forest Hills, 665 F. 2d 443 (3d Cir. 1981).

William S. v. Gill, No. 81-C-3045 (D. Mass. Mar. 31, 1982).

Wright v. Columbia University, 520 F. Supp. 789 (E.D. Pa. 1981).

BIBLIOGRAPHY

1. Turnbull, H.R. & Turnbull, A.P. Free Appropriate Public Education: Law and Implementation. Denver, Colorado: Love Publishing Co., 1978, 3d Ed.., 1982.

2. Stainback, W. and Stainback, S. A review of research on the educability of profoundly retarded persons. Education and Training of the Mentally Retarded, 1983, 18, 90-100.